(18)

NO. 96-1037

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

THE KIOWA TRIBE OF OKLAHOMA
a federally recognized Indian Tribe
Petitioner

v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation
Respondent

On Writ of Certiorari
to the Court of Appeals, Division I
For the State of Oklahoma

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The power to regulate Indian commerce has been delegated to Congress by the United States Constitution. Art. I, sec. 8, cl. 3. Congress actively exercises this delegated power. This Court consistently recognizes both Congress' role and its policies with respect to Indian tribes and Indian affairs.

Respondent and its *amici* present various theories to suggest that individual litigants and States are not obligated to respect either the delegation of this power to Congress or

Congress' exercise of its delegated powers. Largely, these theories key upon the fact that Kiowa engaged in commerce off of its tribal territory. They attempt to exploit quotes from this Court's decisions on issues other than tribal immunity to suit. These theories fail to recognize Congress' delegated power, and the Supremacy Clause and, indeed, are not supported by the authorities cited by Respondent and its *amici*.

ARGUMENT

I.

THE ONLY SOURCE OF COURT POWER OVER AN INDIAN TRIBE IS CONSENT TO SUIT BY EITHER CONGRESS OR THE TRIBE.

Neither Respondent nor *amici* can avoid the fact that the States, in the Constitution, delegated control of Indian commerce and affairs to Congress. This delegation is so extensive that the States ". . . have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. ____, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Congress is the proper forum for dealing with issues concerning Indian commerce and Indian affairs.

State courts are the proper forum *only* if either Congress or the tribe consents to suit. *See, United States v. U.S.F.&G.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed.2d 894 (1940) (consent alone gives jurisdiction to adjudge against a

sovereign; absent that consent, the attempted exercise of judicial power is void.) In this case, there is no consent to suit. In fact, there is even an express reservation of sovereign rights by Kiowa.

It is important for States to respect this delegation of power to Congress because Congress actively exercises its delegated power. Congress formulates policy and, with a number of federal programs, pursues goals as to Indian tribes. *See e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*; Indian Financing Act, 25 U.S.C. § 1451 *et seq.*; Indian Gaming Regulation Act, 25 U.S.C. § 2701 *et seq.*; Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. § 1401 *et seq.* Congress' power, policy and programs should not be disrupted by state courts which claim authority over Indian commerce and affairs.

Congress' position on tribal immunity to suit is clear. Congress recognizes tribal immunity to suit, has consistently refused to modify tribal immunity to suit, *Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), and, on two occasions, has even specifically protected tribal immunity to suit. *See* 25 U.S.C. § 450(n) (nothing in this Act shall be construed as (1) affecting, modifying, diminishing or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe;) and 25 U.S.C. § 3746 (nothing in this chapter shall be construed to affect, modify, diminish or otherwise impair the sovereign immunity from suit enjoyed by Indian tribes).

This Court has consistently recognized both Congress' prerogative and position on tribal sovereignty. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.) Here, there is no question about the legislative intent of Congress. Congress wishes to preserve tribal immunity to suit.

If Respondent and *amici* disagree with Congressional policy, it is Congress, and not the state courts, that they should ask to change it. As recently as September of 1997, Congress considered limiting tribal immunity to suit. The Department of the Interior and Related Agencies Appropriations Bill, 1998, H.R. 2017, at § 120, as reported to the Senate, provided that tribes which accepted certain funds from the Bureau of Indian Affairs would waive any claim of immunity to suit. That provision was eliminated from the bill after agreement by the Chairman of the Indian Affairs Committee to hold hearings on tribal immunity to suit by April 30, 1998. Cong. Rec. § 9388-9399 (Sept. 16, 1997). Congress is keenly aware of tribal immunity to suit and is currently working on the issue. *Amici* States and private litigants have an immediate opportunity to make their views known to Congress. Should the need for change be apparent, Congress will respond as appropriate.

The plain delegation to Congress of power over Indian commerce and Congress' active attention to tribal immunity to suit make it obvious that Oklahoma courts have assumed powers that they do not have. The Oklahoma courts acted inconsistently with Congress in an area in which

Congress has virtually exclusive authority. Congress did not consent to this suit. Kiowa not only did not consent, but, it even reserved its sovereign rights. This judgment must be vacated for lack of jurisdiction.

II.

THIS COURT'S DECISIONS PLAINLY AND CONSISTENTLY RECOGNIZE TRIBAL IMMUNITY TO SUIT.

Respondent and *amici* draw upon several of this Court's decisions to suggest that this Court created, in state courts, the power to join Congress in the regulation of Indian commerce and affairs, particularly if the tribe is acting off of Indian Country, or, is sued in a state court. None of these decisions go that far. In fact, this Court repeatedly upholds tribal immunity to suit and specifically recognized tribal immunity to suit where a State sought to regulate off-reservation fishing. *Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed. 2d 667 (1977) (*Puyallup III*).

If a tribe is sued in a state court, then Respondent argues that *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989), holds that the state court has jurisdiction "to hear the case and to adjudicate the merits of the defense of sovereign immunity raised by the Tribe."[1] Respondent plainly intends this to mean that *Graham* gives a state court authority to define the nature of

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[1]Brief for Respondent ("Resp. Br.") at p. 3.

tribal sovereignty and tribal immunity to suit. *Graham* does not grant the States such authority. *Graham* merely holds that a tribal immunity defense does not make a suit in state court removable to federal court. *Graham* applies the "well-pleaded complaint" rule to determine removability, even with respect to suits against Indian tribes.

Because *Graham* leaves a suit against an Indian tribe in state court, the state court necessarily must make rulings in response to the tribal immunity defense. It is the extent and reach of the state court rulings that created the problem in this case. Because the States delegated power over Indian commerce to Congress, a state court's ruling in response to a tribal immunity defense can be only a ruling on its own jurisdiction.

In this case, and in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995) cert. denied _____ U.S. _____, 116 S.Ct. 1675, 134 L.Ed.2d 779 (1996), the Oklahoma court concluded that, instead of ruling on the limits of its own jurisdiction, it could define the extent of tribal immunity to suit. In its decision, the Oklahoma court abrogated tribal immunity to suit. But, a state court has no such authority. This is so because tribal sovereignty is subordinate only to the federal government, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) and tribal immunity may not be diminished by the States. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986).

A state court is Constitutionally obligated to respect these principles of federal law because, "(t)he Supremacy Clause makes (federal) laws 'The supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 2438, 110 L.Ed.2d 332 (1990). The obligation placed upon States by the Supremacy Clause cannot be reduced to a mere matter of comity, as the Oklahoma Supreme Court held in *Hoover*. "The Constitution and laws of the United States are not a body of laws external to the States, acknowledged and enforced simply as a matter of comity" *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. _____, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

Respondent and its *amici* further argue[2] that state judicial power over tribes is created by selected quotes excised from this Court's opinions in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) ("State authority over Indians is yet more extensive over activities . . . not on any reservation") and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267 36 L.Ed.2d 114 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state").

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[2]Resp. Br., p. 4; *See also* Brief *amicus curiae* of the State of Oklahoma in support of Respondent ("Resp. Okla. Br."), p. 9-10; Brief *amicus curiae* of states in support of Respondent ("Resp. States Br."), p. 11-12; Brief *amicus curiae* of First National Bank in Altus and Raymond L. Friedlob in Support of Respondent ("Resp. Bank Br."), p. 10-11.

Kake and *Mescalero* plainly recognize that certain designated Indian activities outside Indian Country may be subject to some degree of state regulation or taxation. *Mescalero* determined that a ski resort off of Indian country was subject to state taxation, in the absence of federal preemption. *Kake* subjected Indians fishing in state waters to state regulations on fishing. But, neither *Kake* nor *Mescalero* addressed tribal immunity to suit. The issue of tribal immunity to suit was not in either *Kake* or *Mescalero* because in both instances the suit was initiated by the tribe, itself. Thus, quotes excised from those opinions are not relevant to Kiowa's immunity to suit.

When dealing directly with the question of tribal immunity to suit, this Court consistently recognizes that Congress, in defining the nature of Indian tribes and controlling Indian commerce, has preserved tribal immunity to suit. *Citizen Band*, 111 S.Ct. at 910 (". . . Congress has consistently reiterated its approval of the immunity doctrine.") This Court has been careful to distinguish a tribe's immunity to suit from other aspects of a tribe's sovereignty, or, from a tribe's immunity from state taxation or state regulation. In *Puyallup III*, this Court determined that the tribe, itself, was immune from suit when the State of Washington secured orders against the tribe in an attempt to regulate fishing both on and off reservation. The individual tribal members, who claimed fishing rights under a treaty, were treated differently. The Court explained, "the successful assertion of tribal immunity ... does not impair the authority of the state court to adjudicate the rights of individual defendants ..." *Puyallup III*, 97 S.Ct. at 2621.

Respondent does not cite *Puyallup*[3] when it argues that tribal immunity does not apply to actions outside Indian Country. But, plainly, *Puyallup III* applied tribal immunity, even with respect to the fishing outside Indian Country.

This Court again distinguished tribal immunity to suit from other aspects of tribal sovereignty in *Citizen Band*, 111 S.Ct. at 905. There, it applied Oklahoma's cigarette tax to Indian Country sales to non-tribal members. This Court explained that tribal sovereign immunity "does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." *Id.* 111 S.Ct. at 911. But, when Oklahoma asked the Court to grant a money judgment against the tribe for uncollected past taxes, this Court refused to do so. It stated that it was "not disposed to modify the long-established principle of tribal sovereign immunity." *Id.* 111 S.Ct. at 910.

As *amicus*, the State of Oklahoma suggests that tribal immunity to suit applies only if the underlying tribal activity took place within Indian Country.[4] It cites *Citizen Band* and emphasizes that the cigarette sales at issue in that case were all within Indian Country. This analysis ignores the fact that *Citizen Band* addressed two aspects of tribal sovereignty --

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[3]*Amici* First National Bank in Altus and Raymond L. Friedlob reference *Puyallup III* as a case limited solely to fishing on reservation. (Resp. Bank Br., p. 11-2) The facts of the case, as recited in the opinion, show that the state court judgment at issue related to fishing both on and off reservation. *Puyallup III*, 97 S.Ct. 2619.

[4]Resp. Okla. Br., p. 12. *Amici* States make a similar suggestion (Resp. States Br., p. 13) as does *amicus* First National Bank in Altus and Raymond L. Friedlob (Resp. Bank Br., p. 12).

the tribe's amenability to state cigarette taxes and the tribe's amenability to unconsented suit. The *Citizen Band* opinion draws no geographical line regarding tribal immunity to suit. When it upholds tribal immunity to suit, *Citizen Band* refers to long established law that recognizes tribal immunity to suit. It also emphasizes that Congress, although it has the power to modify tribal immunity to suit, has consistently approved the doctrine. Finally, *Citizen Band* points out that immunity to suit is a part of Congress' pursuit of its "overriding goal" of encouraging tribal self-sufficiency and economic development. To the extent that *Citizen Band* placed any emphasis upon geography, it was to recognize that Oklahoma could not tax Indian Country cigarette sales to tribal members, but might tax such sales to non-tribal members.

Admittedly, *Citizen Band* recognized a right to charge cigarette taxes. But, it denied the right to go to the courts for a money judgment. As to enforcement, this Court plainly referred the State to alternatives other than money judgments against tribes. Those alternatives include agreements with tribes, or, asking Congress for appropriate legislation. With respect to a private litigant, the obvious alternative is to secure a waiver of immunity from the tribe. In this case, Respondent did not obtain a waiver, but, instead, accepted an express reservation of sovereign rights.

Irrespective of what Respondent and its *amici* try to draw from *Graham*, from phrases excised from *Kake* and *Mescalero*, or from interpretations of *Citizen Band*, this Court's holdings on tribal immunity to suit are direct, clear and easily understood. This Court has repeatedly held that a court has no jurisdiction over an Indian tribe unless either

Congress or the tribe create that jurisdiction with a consent to suit. *U.S.F.&G.*, 60 S.Ct. at 657. Any waiver of this immunity must be clearly and unequivocally expressed. *Santa Clara*, 98 S.Ct. at 1677. This is consistent with the delegation of power over Indian commerce to Congress, it recognizes that tribal sovereignty is subordinate only to the federal government, *Confederated Tribes of Colville Indian Reservation*, 100 S.Ct. at 2081, and it preserves tribal immunity from diminution by the states. *Three Affiliated Tribes of Fort Berthold Reservation*, 106 S.Ct. at 2313.

III.

A WAIVER MAY NOT BE IMPLIED FROM THE FACT THAT A TRIBE LEAVES TRIBAL LANDS.

Respondent proposes that this Court may imply a waiver of tribal immunity to suit from the fact that Kiowa engaged in commerce outside tribal lands.[5] This suggestion plainly contradicts the principle that waivers of immunity may not be implied, but must be unequivocally expressed. *Santa Clara*, 98 S.Ct. at 1677, citing *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) *quoting United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). Further, this proposition plainly invites this Court to abrogate tribal immunity to suit, even in the face of Congress' recent decision to retain tribal immunity to suit. This Court has previously displayed a "proper respect" for the "plenary authority of Congress" in

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[5]Resp. Br.at p. 10.

matters involving tribal sovereignty. *Santa Clara*, 98 S.Ct. at 1678. Congress' obvious intent to retain tribal immunity to suit suggests that Respondent's invitation should be declined.

Respondent cites *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); *United States v. Winstar Corp.*, 518 U.S. ___, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996); *Sinking-Fund Case*, 99 U.S. 700, 25 L.Ed. 496 (1878) and *New Jersey v. Yard*, 95 U.S. 104, 24 L.Ed. 352 (1877) in support of its judgment. None of the cases help Respondent's position on tribal immunity to suit. In *Lynch*, there was a specific consent to suit by the United States. *Lynch*, 54 S.Ct. at 844. *Winstar*, *Sinking-Fund* and *Yard* do not deal with a sovereign's immunity to suit, but, rather with whether a sovereign may limit the future functioning of its own sovereign powers.

Amici States argue that if an Indian tribe's commerce is off of Indian Country, nothing in federal law requires States to recognize tribal immunity to suit.[6] Thus, *amici* States propose that each State must be free to define tribal immunity to suit, in the same way that each State was left free to define the immunity of other States by this Court's opinion in *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979).

Both this Court and Congress plainly recognize tribal immunity to suit. *See e.g.*, *Santa Clara*, 98 S.Ct. at 1677 ("Indian tribes have long been recognized as possessing the

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[6]Resp. States Br. at p. 4.

common-law immunity from suit traditionally enjoyed by sovereign powers"). This Court has deemed tribal sovereign immunity to be "a necessary corollary to Indian sovereignty and self-government." *Three Affiliated Tribes of Ft. Berthold Reservation*, 106 S.Ct. at 2313; *see also* 25 U.S.C. § 3746 ("nothing in this chapter shall be construed to affect, modify, diminish or otherwise impair the sovereign immunity from suit enjoyed by Indian tribes.") Thus, federal recognition of tribal immunity to suit is beyond any serious questioning.

In that federal law plainly recognizes tribal immunity to suit, *amici* States must key their argument upon the thought that federal recognition of tribal immunity to suit is not binding upon States. *Amici* States suggest that States are independent sovereigns that recognize the immunity of another sovereign only because of an agreement with that sovereign, or, as a matter of comity, relying upon *Hall*, 99 S.Ct. at 1186.

Amici's proposal requires an extensive re-casting of the basic relationship among tribes, States and the Federal Government. *Amici's* proposals plainly envision that tribes, States and the Federal Government be treated as three completely independent and unrelated sovereigns. In our federal system, this is not the case.

While States do, indeed, retain various aspects of sovereignty, they delegated the power over Indian commerce to Congress. Art. I, sec. 8, cl. 3, United States Constitution. This delegation is so complete that states have been divested of virtually all authority over Indian commerce and Indian tribes. *Seminole Tribe of Fla.*, 116 S.Ct. at

1126. With respect to Indian commerce, states are not the independent sovereigns discussed in *Hall*.

Indian tribes are entities so unique that comparison to either states or foreign governments risks serious mischaracterization of the nature of tribes. Tribes are sovereigns, but of a unique and limited nature. They retain some of the inherent powers of self-governing political communities that were formed long before Europeans first settled North America. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Today, tribal sovereignty exists only at the sufferance of Congress and is subject to complete defeasance by Congress. *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978). Because of the States' delegation of power to Congress, tribal sovereignty is dependent on and subordinate to, only the Federal Government, not the States. *Confederated Tribes of Colville Indian Reservation,* 100 S.Ct. at 2081. Tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States. *Three Affiliated Tribes of Fort Berthold Reservation,* 106 S.Ct. at 2313. Thus, tribes look only to Congress for a definition of their nature, powers and even their existence. They certainly are not the independent sovereigns discussed in *Hall*.

Congress, in the exercise of its delegated power, has formulated a national policy for Indian commerce and affairs. Congress' goal is to promote Indian self-government with an "overriding goal" of encouraging tribal self-sufficiency and economic development. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987); 25 U.S.C. § 450(b). In

pursuit of these goals, Congress recognizes a trust responsibility to tribal governments that includes the protection of the sovereignty of each tribal government. 25 U.S.C. § 3601(2). This sovereignty which Congress protects includes tribal immunity to suit, which Congress has explicitly protected on two occasions. 25 U.S.C. § 450(n) and 25 U.S.C. § 3746. If Congress is to exercise its delegated powers with a comprehensive national policy, then Congress must be the source of the articulation of any State powers -- not the States themselves. Thus, as to Indian commerce, it is necessary to recognize the supremacy of the Federal Government.

Because of the States' delegation of power over Indian commerce to Congress and because Congress is actively pursuing an articulated policy in the delegated area, States have no basis to claim powers that otherwise would belong to an independent sovereign. As to matters which concern Indian commerce, the Supremacy Clause is more significant than the *Hall* idea that States are free to define their own independent positions.

IV.

POLICY CONSIDERATIONS SHOULD BE DIRECTED TO CONGRESS.

Amici States advance various policy arguments to support Oklahoma's novel position on tribal immunity to suit.[7] What *amici* promote with these policy considerations is not reform of immunity -- a step that many of *amici* States

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[7]Resp. States Br., p. 16-19; Resp. Okla. Br., p. 13-17.

have taken for themselves by legislation -- but, rather, a complete elimination of immunity -- a step that none of *amici* States have taken for themselves. In fact, Florida was only recently before this Court urging its own sovereign immunity to suit. *Seminole Tribe of Fla.*, 116 S.Ct. at 1121. Doubtlessly, *amici* States understand the importance of immunity and the importance of having any reform of immunity come through carefully considered legislation. Because legislation is the proper method to achieve a reform of tribal immunity to suit, *amici's* policy consideration are best directed to Congress. In a legislative forum, the States' concerns can be weighed against those of both the tribes and the United States.

CONCLUSION

For these reasons, and for the reasons stated in the Petitioner's Brief, the judgment must be reversed with instructions that the suit be dismissed. Without a waiver of tribal immunity, Oklahoma courts have no jurisdiction.

Respectfully submitted,

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